Supreme Court, U. S.
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77-632

IN THE

Supreme Court of the United States

H. MAX MURRAY, et al.,
Appellees, Petitioners,

v.

LAWRENCE S. WAGLE,
Appellant, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALBOM, COX, ANDREWS, HAMM & POND
By: HARRY R. CALBOM, JR.

DAVIES, PEARSON, ANDERSON, SEINFELD, GADBOW, HAYES & JOHNSON

By: ALVIN A. ANDERSON and
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IN THE

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v.

LAWRENCE S. WAGLE,
Appellant, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on September 29, 1977.

CITATIONS TO OPINIONS BELOW

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Order Denying Rehearing. Appendix "I"

JURISDICTION

The opinion of the U.S. Court of Appeals for the Ninth Circuit reconsidering the cause was entered on September 2, 1977, and its order Denying Petition for Rehearing was entered on September 29, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The Federal Statutes involved are 42 U.S.C. §1983 [Civil Rights Act of 1871] as well as the First and Fourteenth Amendments to the Constitution.

QUESTIONS PRESENTED

(1) Whether Defendants-Petitioners, public school officials and school district, could non-renew Plaintiff-Respondent school teacher's contract with the school district because of plaintiff's marginal performance as a teacher, even though the plaintiff had engaged in conduct protected by the First and Fourteenth Amendments.

(2) Whether a school district may non-renew the employment contract of a teacher who engages in speech protected by the First Amendment where independent grounds for the non-renewal in the teacher's substandard performance are established as a matter of law from uncontroverted testimony.

(3) Whether the District Court could grant judgment for the school district notwithstanding a jury finding that the school teacher's termination was motivated by activities protected by the First Amendment, where the District Court found as a matter of law that the school district would have reached the decision to non-renew even in the absence of the protected conduct.

STATEMENT OF FACTS

This is a lawsuit by a high school teacher against Longview, Washington public school officials and school district, alleging that his contract was non-renewed because he was exercising his First Amendment rights. The school maintained that he was non-renewed because of his very marginal performance as a teacher.

The teacher was hired in 1962 to fill the emergency needs for a teacher at the R. A. Long High School when a history teacher died suddenly. In his first year, the teacher was rated third from the bottom of fifty to sixty teachers rated by the high school principal. This rating did not improve during his term of employment. On balance, the teacher's performance was less than average. At times, his performance and relationship with students was good and then suddenly it would be just exactly the opposite. A supervisor testified that he did not meet the standards required of teachers in the Longview area. The low appraisals of the teacher were made in good faith and were done in the regular course of school administration. The administrators gave the teacher opportunity after opportunity to improve over several years. They found that he did not improve and a new principal, Dr. Murray, nonrenewed the teacher's contract at the first opportunity that

he had under the record of the teacher's performance. (Findings of Fact App. A-6).

During his third year, the teacher was elected chairman of the local chapter of the American Civil Liberties Union. The following year he began to challenge school practices of holding a baccalaureate service and offering prayers at the annual honor society banquet. He wrote a letter to the local newspaper expressing his views on the subject. He also wrote to the newspaper defending the A.C.L.U. position favoring legalization of marijuana. These speech activities provoked public comment, largely critical of the teacher. Further public controversy was raised by the teacher's distribution to his students of a pamphlet entitled "The Student as Nigger" which analogized the student-teacher relationship to a system of slavery.

Before, during, and after the teacher's First Amendment activity, he received poor ratings as a teacher. Following his first year, the principal indicated reservations as to whether he should be retained. The following year, the principal felt it necessary to write notes to the school superintendent indicating that the teacher was having disciplinary problems. In subsequent years, the principal recommended that the usually automatic annual increment be withheld because the teacher was ineffective. The principal continued to have "grave doubts" about keeping the teacher on the staff, but wanted to give the teacher a chance to improve. The teacher's performance continued marginal to average, while the school wanted superior performance for its students. The successor principal terminated the teacher's contract on his initial review of the teacher's performance.

The two principals and several fellow teachers testified

to Appellant's ineffectiveness. The vice-principal said that it was inevitable that the Appellant's contract would not be renewed because he was not a good teacher, and his methods of teaching were not good. The only evidence presented by the teacher to contest the assertions of his ineffectiveness as a teacher came from some of his former students, who spoke in his favor. But even they recognized that the plaintiff had discipline problems and was erratic.

The case was submitted to the jury with an instruction which posed the following issue:

> Was the plaintiff non-renewed for probable cause because he had become an ineffective teacher, or was plaintiff non-renewed because of his exercise of his constitutionally protected rights of free speech and association?

The District Court also instructed the jury that, in order to find the individual defendants personally liable, it had to find that they "acted in bad faith", i.e., "without having probable cause to believe that plaintiff was ineffective as a teacher." The jury verdict form (App. A-1) limited the jury to find against either the school board members individually, or the school administrators individually, or against all defendants in general. The jury limited its verdict to finding against all defendants generally under the latter option. It awarded damages of $50,000.00.

The District Court, Judge Walter McGovern, granted judgment N.O.V. in favor of the school upon finding that "there was no evidence in the record to support the finding that Mr. Wagle was non-renewed because he was exercising his First Amendment Rights." (App. A-2). The Court found that the non-renewal was solely a direct result of Appellant's incapacity as a teacher.

The Court of Appeals reversed, reasoning that on the

above instruction, "there was evidence from which the jury could have inferred *either motive*." (Emphasis added, App. A-23). It concluded that there was a reasonable basis for the jury's verdict "*when the issue is motive*, as in this case." (Emphasis added, App. A-25).

Upon petition for Certiorari to this Court, the judgment was vacated and the case remanded to the U.S. Court of Appeals for the Ninth Circuit for further consideration in the light of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, ... L. Ed. 2d ..... (1977), which held, inter alia, that even if constitutionally protected conduct was a "motivating factor" in the board's decision not to rehire, the non-renewal is proper where the board would have reached the same decision as to a teacher's re-employment even in the absence of the protected conduct (97 S. Ct. at 576).

Upon reconsideration, the Court of Appeals adherred to its original decision (App. A-1).

REASONS FOR GRANTING THE WRIT

(1) The opinions of the Court of Appeals directly conflict with the ruling of this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, ... L. Ed. 2d ..... (1977). *Mt. Healthy* and the instant case are identical in their material facts. There, as here, the school legally could have dismissed the teacher had the speech activity never come to its attention. The jury in the instant case determined, and the Court of Appeals likewise concluded, that the teacher's First Amendment conduct was a "motivating factor" in the school's decision not to rehire. The Court of Appeals ruled in its opinion at 546 F.2d 1334:

> The issue submitted to the jury was whether appellees terminated appellant's employment because they disapproved of communications and expressive activity protected by the First Amendment, or because he was an ineffective teacher. There was evidence from which the jury could have inferred *either motive*.

(Emphasis added, App. A-23).

The District Court, in granting an order of dismissal N.O.V., determined that the undisputed evidence showed, as a matter of law, that the school would have reached the same decision regarding the teacher's re-employment even in the absence of the protected conduct. Thus, the District Court anticipated the proper test annunciated by this Court in *Mt. Healthy*.

(2) The cause below was tried on the issue of whether the school was motivated by the teacher's First Amendment activity in its non-renewal of his contract. This was the conclusion of the Court of Appeals: "this is particularly true when the issue is motive, as in this case." (App. A-25).

It was assumed at trial that if the plaintiff's First Amendment activity in any way motivated the school to terminate his employment, the jury would have to find for the teacher. Thus, the jury was instructed in pertinent part:

> In order to prove his claim, the burden is upon the plaintiff to establish, by a preponderance of the evidence, the facts that:
>
> First: That the non-renewal of plaintiff's teaching contract was because of his exercise of his constitutional rights.
>
> • • •
>
> *An injury or damage is proximately caused by an act, or failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage;* and that the injury or damage

> was either a direct result or a reasonable probable consequence of the act or omission.

(Emphasis added).

The instructions provided a restricted choice to the jury. If it found that the non-renewal was motivated by the teacher's free speech activity, it should rule in favor of the teacher. This was the jury result. It had to return a verdict for the teacher where it found that the school disapproved of the protected activity, whether or not he was *also* an ineffective teacher, and regardless of independent grounds for non-renewal. The District Court determined that the case should not have been submitted to the jury because the testimony of all the teachers and administrators was unanimous that plaintiff was a marginal teacher and *as a matter of law*, the teacher would not have been re-employed in any case. The District Court remedied an erroneous issue of causation which focused solely on whether protected conduct played a part in the decision not to rehire.

(3) The District Court found, at the conclusion of trial, that the undisputed material facts showed as a matter of law that the plaintiff was non-renewed only for the reason stated by the two principals who had exercised supervision over him, to-wit, that he was a marginal teacher. The Court of Appeals erred in concluding that the jury determined that the teacher was non-renewed only "because of" his exercise of First Amendment rights. Clearly, the "but for" instruction to the jury asked only whether First Amendment activity "played a substantial part in bringing about or actually causing the injury or damage." The Court of Appeals was quite correct in its first opinion that the issue submitted to the jury was one of motive. As this Court held in *Mt. Healthy*, the law must look beyond motive and further determine whether there were independent grounds to support a teacher non-renewal, such as ineffective performance. This case must be reviewed in light of the law as it now stands, not as it stood when the case was presented to the jury. *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 402 U.S. 412, 92 S. Ct. 574, 30 L. Ed. 2d 567 (1972). Applying *Mt. Healthy* to the instant case requires reversal of the Court of Appeals and reinstatement of the judgment of dismissal entered by the District Court.

(4) The second opinion of the Court of Appeals reviewed the evidence cited in the first opinion as support for its position:

> There was evidence that criticism of appellant's effectiveness as a teacher began with the church-state controversy, intensified during the marijuana incident, diminished in the lull preceding the distribution of the pamphlet, recommenced following that distribution, and continued until appellant's termination. There is also evidence that in faculty meetings, exchanges between appellant and the school principal and superintendent, and meetings of the board, appellant's expression of controversial views was linked with his possible dismissal. Finally, there was evidence that appellees were aware of the problem of sustaining a dismissal based upon the appellant's communications, and deliberately undertook to "build a record" to support dismissal on other grounds.
>
> From this circumstantial evidence the jury could reasonably infer that appellant's termination was motivated by the public expression of his controversial views.

546 F.2d at 1335 (App. A-24, 25). The second opinion errs in concluding that such inferences supported the proposition that the teacher would not have been fired in any event. The foregoing offers at best support for the school's "motivation." It does not determine whether or not there

were also independent grounds for the non-renewal. Where the independent grounds for nonrenewal were uncontroverted, the District Court was within its power to enter judgment N.O.V. There is reversible error "when there is a complete absence of probative facts to support the conclusion reached [by the jury]." *Dennis v. Rio Grande Western Ry.*, 375 U.S. 208, 84 S. Ct. 291, 11 L. Ed. 2d 256 (1963). This being a case in equity, the trial court was bound to review the evidence, and set aside the jury's verdict where there was no evidentiary support. *Idaho & Oregon Land Improvement Co. v. Bradbury*, 132 U.S. 509, 10 S. Ct. 177, 33 L. Ed. 433 (1889).

The opinions of the Court of Appeals failed to distinguish between the result (non-renewal of the teaching contract) caused by a constitutional violation from one not so caused. The jury decision concluded only that a "motive" could be inferred that plaintiff's termination was for constitutionally protected activity. This Court, in *Mt. Healthy*, rejected motive as the sole test, in favor of objective teacher evaluation.

(5) Plaintiff, a borderline or marginal teacher, was placed in a better position with regard to re-employment as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. He ought not be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of his decision. *See Mt. Healthy* at 97 S. Ct. 575.

(6) The decision of the Court of Appeals directing rehire is of great moment to the Longview School District,

and to the Southwest Washington area. The school wanted strong-to-superior performance in the school's social studies and citizenship training program. The instant decision of the Circuit Court of Appeals frustrates this policy by requiring the rehire of a borderline, marginal teacher who would not have been rehired absent his engagement in constitutionally protected conduct.

CONCLUSION

The Court should grant the Petition for Certiorari and hear the issues raised in this important area of civil rights and public school administration.

Respectfully submitted,

CALBOM, COX, ANDREWS, HAMM & POND

By: HARRY R. CALBOM, JR.

DAVIES, PEARSON, ANDERSON, SEINFELD, GADBOW, HAYES & JOHNSON

By: ALVIN A. ANDERSON and
JOHN C. KOUKLIS

Attorneys for Petitioners

APPENDIX A

DISTRICT COURT OF THE UNITED STATES
WESTERN DISRICT OF WASHINGTON

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT of WASHINGTON
Dec. 8, 1972
EDGAR SCOFIELD, Clerk
By ....., Deputy

LAWRENCE S. WAGLE,
Plaintiff,
v.
H. MAX MURRAY, *etc., et al.,*
Defendants.

No. 4281
VERDICT

WE THE JURY IN THE ABOVE CAUSE, FIND

For the Plaintiff and against all Defendants, the School Board, the School Board Members, and the School Administrators in the amount of:

$50,000.00,

OR,

For the Plaintiff and against the Defendant School Board Members Betty Buck, Harold Frieberg, David Hallen, Raymond McDermott, and Eunice Van Sickle (strike those against whom you do not find, if any), individually in the amount of:

$.....,

OR,

For the Plaintiff and against the School Administrators Russel Esvelt and H. Max Murray (strike one if you find against only one of these), individually in the amount of:

$.....

December 8, 1972.
(Date)

/s/ .....
(Foreman)

APPENDIX B

DISTRICT COURT OPINION
(Unpublished excerpt)

I think that is appropriate under these facts. Plaintiff failed to exhaust such remedies and I don't think he had a claim under the Civil Rights Acts.

Second, I will also grant Defendants' motion for a judgment notwithstanding the verdict.

As I view the verdict, it had to be based upon guess, speculation or conjecture.

There was no evidence in the record to support the finding that Mr. Wagle was non-renewed because he was exercising his First Amendment rights.

Nothing in the record can support a finding that he was non-renewed for any reason other than those stated by Mr. Thompson and Dr. Esvelt.

Basically, Mr. Thompson stated that it was the Plaintiff's failure of lack of curriculum the last full semester of the year plus the lack of student control and his childish relationships with the students in the hall that made Plaintiff's performance as a teacher very marginal. On balance, his performance was less than average. At times his performance and relationship with the students was good and then suddenly it would be just exactly the opposite. His discharge was his fault. He did not advance in improvement and that is the important thing with me.

He also went on to say that he had constantly given Mr. Wagle a less than satisfactory rating in the years he had been there. In fact, in the first year he rated him third from the bottom of 50 to 60 teachers that he rated after the first year of teaching and then he went on to say that there was no improvement.

Dr. Murray said Plaintiff was non-renewed that first year and Dr. Esvelt said Plaintiff, as a teacher, does not meet the standards required of teachers in the Longview area. The fact that Plaintiff was controversial had nothing to do with non-renewal.

Considering the instructions, basically Instructions 7 and 10:

> "In order to prove his claim, the burden is on the Plaintiff to establish, by a preponderance of the evidence the facts that:
>
> "First:—"and
>
> "Second: That the non-renewal of Plaintiff's teaching contract was the proximate cause of the injury and consequent damage to Plaintiff."

I find no proximate cause between the non-renewal; I find no proximate cause, is what I mean to say, no evidence to sustain the finding of proximate cause.

Instruction Number 10:

> "You are instructed that for the Defendants Esvelt and Murray to be held to have acted in bad faith, or willfully, so as to be liable in damages in their individual capacity then you must find that in making a recommendation of non-renewal of Plaintiff's teaching contract that they did so without having probable cause to believe that Plaintiff was ineffective as a teacher."

The evidence throughout the entire trial was nothing other than the fact that the first year he did not meet the requirements of the administrators of the school—nothing else.

They gave him opportunity after opportunity over several years, for which I commend them. I think they should give a teacher an opportunity to improve if he has not met the standards and if they think that he has the capacity to improve. Apparently they did, apparently they thought he did, but apparently Mr. Wagle did not.

Now, as for Dr. Murray, he non-renewed Plaintiff's contract the first opportunity that he had under the record of Plaintiff's performance.

There is nothing in the record to show that other than by guess or speculation of conjecture that there was any

bad faith on his part, or that he willfully did so because Mr. Wagle was exercising First Amendment rights.

With attention to the school board members, a typical example would be Mr. David Hallin, who went on the board in November 1967. He, along with the other members, was presented the facts relating to Plaintiff's performance over the years, the fact that Plaintiff had not improved as the Superintendent had hoped, and that the Plaintiff's performance was less than average and that Plaintiff should be non-renewed for those reasons. He accordingly voted that way.

Under what fact in the record can this Court sustain a verdict of $50,000 against him for that decision? In my opinion there is absolutely none.

It is certainly equally true of the other school board members like Mrs. Buck and Mrs. Van Sickle.

It is also clear from the foregoing, that Plaintiff's motion for reinstatement and for two years' back pay is denied, as is Plaintiff's request for reasonable attorney's fees. That is also denied.

Even if my conclusions were other than those stated here today, in the exercise of discretion, I would deny the request.

Mr. Anderson, you will prepare the appropriate order.

MR. ANDERSON: Thank you, your Honor.

(At 11:50 o'clock a.m., January 12, 1973, hearing in the within-entitled and numbered cause was adjourned.)

APPENDIX C

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LAWRENCE S. WAGLE,
Plaintiff,

v.

H. MAX MURRAY, as Principal of the R. A. Long High School, and H. MAX MURRAY & JANE DOE MURRAY, husband and wife, individually; RUSSELL ESVELT & JANE DOE ESVELT, husband and wife; MILTON H. SMITH, as Superintendent of Longview School District No. 122; BETTY BUCK, HAROLD FRIEBERG, DAVID HALLIN, RAYMOND MCDERMOTT and EUNICE VAN SICKLE, as members of the Board of Directors of Longview School District No. 122; BETTY BUCK and CHARLES E. BUCK, wife and husband; HAROLD FRIEBERG and JANE DOE FRIEBERG, husband and wife, RAYMOND MCDERMOTT and JANE DOE MCDERMOTT, husband and wife, EUNICE VAN SICKLE and R. V. VAN SICKLE, wife and husband; LONGVIEW SCHOOL DISTRICT No. 122, a Washington municipal corporation,
Defendants.

Civil Action

No. 4281

FINDINGS OF FACT and CONCLUSIONS OF LAW

THIS CAUSE having come on for trial and the Court having empaneled a petit jury and having heard the evi-

dence and having considered all legal briefs and arguments of the parties, finds the facts and states the conclusions of laws as follows:

FINDINGS OF FACT

1. The Court adopts, by reference, all of the Admitted Facts set forth at length in the Pretrial Order, pages 3 through 6 inclusive, to the same effect as though set forth at length.

2. Ther is no evidence in the record to support a finding that plaintiff Wagle was non-renewed because he was exercising his First Amendment rights. There is no evidence in the record that the defendants failed to protect and support the plaintiff in his exercise of constitutionally protected rights. Nor is there any evidence in the record other than that based upon guess, speculation or conjecture that, but for his exercise of constitutionally protected rights, plaintiff's contract would have been renewed by defendants.

3. This record shows, as a matter of fact, that the only reasons for plaintiff's non-renewal were those stated by Mr. Thompson and Dr. Esvelt. Basically, Mr. Thompson stated that it was plaintiff's failure of lack of curriculum the last full semester plus the lack of student control and his childish relationships with the students in the hall that made plaintiff's performance as a teacher very marginal. On balance, plaintiff's performance was less than average. At times, his performance and relationship with students was good and then suddenly it would be just exactly the opposite. Plaintiff's discharge was his own fault. Plaintiff did not advance in improvement and this led to his non-renewal.

4. Mr. Thompson is not a party to this action and for several years prior to the non-renewal he testified that he had constantly given plaintiff a less than satisfactory rating in those years Mr. Thompson had been there. In fact, in plaintiff's first year Mr. Thompson had made a rating on the plaintiff and he rated him third from the bottom of 50 to 60 teachers that Mr. Thompson had rated after the first year of teaching and Mr. Thompson went on to testify that plaintiff made no improvement.

5. Dr. Esvelt testified in substance that plaintiff does not meet the standards required of teachers in the Longview area.

6. Finally, Dr. Murray testified that plaintiff was non-renewed in his [Murray's] first year based on these prior ratings and because he made no improvement and was an ineffective teacher.

7. There is no evidence to support a finding that plaintiff was non-renewed because he was controversial. The appraisals made of plaintiff by Mr. Thompson, Dr. Esvelt and Dr. Murray were made in good faith and were done in the regular course of school administration.

8. There is no evidence to support a finding that the non-renewal of plaintiff was the proximate cause of injury or damage to plaintiff.

9. The evidence throughout the trial does not support any finding that Dr. Esvelt and Dr. Murray acted in bad faith or wilfully so as to be liable in damages individually for recommending non-renewal of plaintiff. The evidence throughout the entire trial was nothing other than the fact that the first year plaintiff did not meet the requirements of the school administrators—nothing else. The administrators gave plaintiff opportunity after opportunity over several years. They should and did give plaintiff an opportunity to improve and meet their standards if they thought he had the capacity to improve. They did believe he had a capacity to improve. But plaintiff did not improve.

10. The Court specifically finds that Dr. Murray non-renewed plaintiff's contract the first opportunity that he had under the record of plaintiff's performance. There is nothing in the record to show that other than by guess or speculation there was any bad faith on Dr. Murray's part, or that he willfully did so because plaintiff was exercising First Amendment rights.

11. As to the School Board members, the Court finds that a typical example would be David Hallin, who went on the Board in November 1967. He, along with the other members, was presented the facts relating to plaintiff's performance over the years, the fact that plaintiff had not

improved as the superintendent had hoped, and that plaintiff's performance was less than average and that plaintiff should be non-renewed for those reasons. He accordingly voted that way. There is no fact in the record on which this Court could sustain a verdict of $50,000.00 against such School Board member or members for that decision. These facts are equally true and applicable to the other School Board members like Mrs. Buck and Mrs. Van Sickle.

12. The Washington State statutes are express and complete, and they afford all teachers including plaintiff all due process of law protection to which they are entitled. They provided the plaintiff an opportunity to a full hearing if he so desired.

13. The plaintiff's own testimony establishes as a matter of fact that he had no expectancy of a contract renewal and in fact his only expectancy regarding his teaching contract, after April 1968, was that it was not going to be renewed.

14. The Washington State statute was exactly complied with by the defendants in effecting a non-renewal of plaintiff's contract. Plaintiff was given notice of non-renewal of his contract. He did not within 10 days thereafter request the Clerk or Secretary of the Board of Directors for a hearing on the question of his non-renewal. In failing to make a written request for hearing, plaintiff waived his right to a hearing.

15. The Court specifically finds that the plaintiff's note to the personnel officer of April 10, 1970, was not a request for a hearing. It merely said that the non-renewal was illegal and that there would be a legal challenge to the decision of the School Board. This suit constitutes such a challenge. The Court finds that the note by plaintiff on April 13th to the Secretary-Receptionist of the Personnel Office was too late. The last day on which plaintiff could ask for a hearing under the Washington State statute was April 11, 1970. Additionally, the person upon whom the April 13, 1970, notice was served was not, by that statute, authorized to accept such service and that service was ineffective for that reason.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. This case should have been dismissed at the end of the plaintiff's case and at the end of both cases under the authority of *Joe David Toney v. Reagan*, 326 F. Supp. 1093.

2. The procedure available to plaintiff provided for under the laws of the State of Washington constitutes a prospective remedy and *not* a retrospective remedy and, therefore, the plaintiff must exhaust his administrative remedies thereunder, Plaintiff's failure to exhaust his administrative remedy under the Washington State statute is, therefore, fatal to his action under 42 U.S.C. § 1983. The plaintiff waived his administrative remedy and failed to exhaust the same.

3. The defendants' non-renewal of plaintiff's contract was properly done as a matter of law and was not related to plaintiff's exercise of his First Amendment rights.

4. The petit jury's verdict of $50,000.00 against all defendants is based upon nothing but guess, speculation or conjecture and shall be set aside and judgment shall be entered for the defendants notwithstanding the verdict. The motion for judgment notwithstanding the verdict shall be granted.

5. The Court adopts the Conclusions of Law set forth in the defendants' memorandum in support of their motion to dismiss. This cause should not have been submitted to the jury.

6. Judgment shall be entered herein dismissing the plaintiff's suit as to all defendants.

7. The plaintiff's motion for reinstatement and for two years' back pay shall be denied. The plaintiff's request for reasonable attorneys' fees shall be denied.

DONE IN OPEN COURT this 9th day of January, 1973.

/s/ WALTER McGOVERN
Judge

Presented by:

/s/ ALVIN A. ANDERSON
ALVIN A. ANDERSON
of Attorneys for Defendants

ADMITTED FACTS

In the following statement of facts, certain simplified references to compilations of documents are employed; *viz.*, Thompson File refers to documents in the file of Principal Art Thompson; School File refers to documents from the Official School File of the Superintendent's office; Murray File refers to documents in the personal file of Principal Max Murray. The numbers are from the indices of these files, all of which are presented as defendants' exhibits.

1. Plaintiff resides within the Western District of Washington.

2. Longview School District No. 122 ("District" herein) is a municipal corporation of the State of Washington, organized and existing under the authority of Revised Code of Washington §§ 28.57.130 (now 28A.57.130) and 28.57-.135 (now 28A.58.010 and 040); District is a first-class district, as defined in RCW 28.57.140 (now 28A.57.140). The District lies entirely within the Western District of Washington.

3. R. A. Long High School is a public school operated by Longview School District No. 122.

4. Defendants Betty Buck, Harold Freiberg, David Hallin, Raymond McDermott, and Eunice Van Sickle were at all times relevant to this action the duly elected, qualified, and acting Directors of the District, vested by RCW 28-.58.100 (now 28A.24.055, 28A.58.010, 040, 100, 101, 102, 103, 104, 105, 107) and RCW 28.62.180 (now 28A.59.180) with all the powers given to the District by state law. The Directors all reside within the Western District of Washington.

5. The defendant Russell Esvelt was the duly employed Superintendent of the District from July 1, 1967, to June 30, 1970. He resides in or near Wenatchee, Washington, in the Eastern District of Washington.

6. The defendant Dr. Milton H. Smith is now the duly elected, qualified, and acting Superintendent of the District. He was assistant superintendent from 1968 to 1970.

7. RCW 28.62.180 (now 28A.59.180) authorized the District Directors to employ a Superintendent of Schools and to fix his duties. Under the rules, procedures, and practices of the District, as established by the Directors, and as in effect at all times relevant to this action, the Superintendent is charged by the Directors with general responsibility for all personnel matters. All recommendations for nonrenewal of teachers' contracts, for discharge of teachers, and other major personnel decisions involving teachers, are presented to the Directors by the Superintendent, sometimes in person and sometimes through a personnel officer, who is an immediate subordinate of the Superintendent.

8. Defendant H. Max Murray is married, and plaintiff may treat Mr. Murray's wife as Jane Doe Murray.

9. Defendant Russell Esvelt is married, and plaintiff may treat Mr. Esvelt's wife as Jane Doe Esvelt.

10. Defendant Betty Buck is married. Her husband's name is Charles E. Buck.

11. Defendant Harold Freiberg is married, and plaintiff may treat Mr. Freiberg's wife as Jane Doe Freiberg.

12. Plaintiff may treat David Hallin's present or former wife, if any, under the fictitious style of Jane Doe Hallin.

13. Defendant Raymond McDermott is married, and plaintiff may treat Mr. McDermott's wife as Jane Doe McDermott.

14. Defendant Eunice Van Sickle is married. Her husband's name is R. V. Van Sickle.

15. The acts of H. Max Murray and Russell Esvelt arose from the principal occupation of each said defendants.

16. The personal residence of all defendants, other than defendants, Esvellt, are within the Western District of Washington.

17. Emory B. Piper has been assistant principal of R. A. Long High School from 1957 to the present.

18. Charles Arthur Thompson was principal of R. A. Long High School from 1954 to August 1969.

19. Roy La Plant, doctor of educational administration was an administrative assistant in the Longview School District from 1968 through July 1972.

20. Earl Reed was superintendent of the Longview School District during 1962 to 1967.

21. Lawrence S. Wagle, hereinafter referred to as "plaintiff" or "Wagle," age 36, now lives with his father at 711 North 100th, Seattlle, Washington.

22. Wagle attended the University of Washington and received a B.A. in American History in 1961. His over-all gradepoint average was about 2.5 or 2.6, and his average in his major field was about 3.0.

23. In September 1961, Wagle took a one-year job teaching English at Pomeroy in Eastern Washington and left at the end of a year.

24. In August of 1962, R. A. Long history teacher, Robert Cox, died suddenly and Wagle was hired to fill the emergency need for a teacher.

25. Wagle completed the 1962-63 school year and, in the spring of 1963, his contract for the 1963-64 school year was renewed.

26. Wagle completed the 1963-64 school year and, in the spring of 1964, his contract for the 1964-65 school year was renewed.

27. Wagle completed the 1964-65 school year and, in the spring of 1965, his contract for the 1965-66 school year was renewed.

28. Wagle completed the 1965-66 school year and, in the spring of 1966, his contract for the 1966-67 school year was renewed.

29. Wagle completed the 1966-67 school year and, in the spring of 1967, his contract for the 1967-68 school year was renewed.

30. Wagle completed the 1967-68 school year and, in the spring of 1968, his contract for the 1968-69 school year was renewed.

31. Wagle completed the 1968-69 school year and, in the spring of 1969, his contract for the 1969-70 school year was renewed.

32. Wagle completed the 1969-70 school year. In the spring of this school year, his teaching contract was not renewed.

33. Wagle became vice chairman of what was then called the Southwest Washington American Civil Liberties Union in November 1965, chairman November 1966 to November 1969, and chapter representative from November 1966 to November 1969 of the State Board of the American Civil Liberties Union.

34. The Southwest Washington ACLU Chapter is now called the Cowlitz-Wahkiakum Chapter.

35. Rather than setting out those facts clearly admitted by defendants in their answers to plaintiff's requests for admissions under Rule 36(a), these admitted facts are hereby incorporated by reference.

APPENDIX D

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LAWRENCE S. WAGLE,

Plaintiff,

v.

H. MAX MURRAY, *as* Principal of the R. A. Long High School, and H. MAX MURRAY & JANE DOE MURRAY, husband and wife, individually; RUSSELL ESVELT & JANE DOE ESVELT, husband and wife; MILTON H. SMITH, as Superintendent of Longview School District No. 122; BETTY BUCK, HAROLD FREIBERG, DAVID HALLIN, RAYMOND MCDERMOTT and EUNICE VAN SICKLE, as members of the Board of Directors of Longview School District No. 122; BETTY BUCK and CHARLES E. BUCK, wife and husband; HAROLD FREIBERG and JANE DOE FREIBERG, husband and wife; RAYMOND MCDERMOTT and JANE DOE MCDERMOTT, husband and wife; EUNICE VAN SICKLE and R. V. VAN SICKLE, wife and husband; LONGVIEW SCHOOL DISTRICT No. 122, a Washington municipal corporation,

Defendants.

Civil Action

No. 4281

ORDER AND JUDGMENT OF DISMISSAL

The Court, having heard all post trial arguments on motions presented, and having heretofore made and entered its Findings of Fact and Conclusions of Law, and the defendants now moving for the entry of a judgment N.O.V., and for a judgment of dismissal of the plaintiff's cause, the matter coming on duly and regularly to be heard before this Court on the 9th day of February, 1973, and the Court having filed its Opinion, dated January 12, 1973, it is

ORDERED that the defendants' motion for judgment, notwithstanding the verdict of the jury, be and the same hereby is granted, and the verdict of the jury filed herein be and the same hereby is set aside and held for naught, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff's complaint and all claims therein stated be and the same hereby are dismissed with prejudice, and all relief, both legal and equitable, sought herein is denied, including, the plaintiff's motion for reinstatement and for two years' back pay, and for attorney fees. Defendants shall have and recover their costs herein to be taxed.

DATED this 9th day of February, 1973.

Approved:

/s/ WALTER MCGOVERN
UNITED STATES DISTRICT JUDGE

Presented by:

ALVIN A. ANDERSON
Of Attorneys for Defendants

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE S. WAGLE,
Plaintiff,
v.
H. MAX MURRAY, as Principal of the R. A. Long High School, and H. MAX MURRAY & JANE DOE MURRAY, husband and wife, individually; RUSSELL ESVELT & JANE DOE ESVELT, husband and wife; MILTON H. SMITH, as Superintendent of Longview School District No. 122; BETTY BUCK, HAROLD FRIEBERG, DAVID HALLIN, RAYMOND McDERMOTT and EUNICE VAN SICKLE, as members of the Board of Directors of Longview School District No. 122; BETTY BUCK and CHARLES E. BUCK, wife and husband; HAROLD FREIBERG and JANE DOE FREIBERG, husband and wife, RAYMOND McDERMOTT, and JANE DOE McDERMOTT, husband and wife; EUNICE VAN SICKLE and R. V. VAN SICKLE, wife and husband; LONGVIEW SCHOOL DISTRICT No. 122, a Washington municipal corporation,
Defendants.

FILED
Nov. 10, 1976

Emil E. Melfi, Jr.
Clerk,
U.S. Court
of Appeals

No. 75-2066

OPINION

Appeal from the United States District Court
for the Western District of Washington

Before: BROWNING and CHOY, Circuit Judges,
and *WEIGEL, District Judge

BROWNING, Circuit Judge:

Appellant brought this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, against the principal of R. A.

*Honorable Stanley A. Weigel, United States District Judge, Northern District of California, sitting by designation.

Long High School, Longview, Washington, the superintendent and members of the board of directors of the Longview School District, and the school district itself.[1] He alleged that appellees terminated his employment as a history teacher at the high school because of his exercise of his First Amendment right of free speech, and in violation of his Fourteenth Amendment right to procedural due process. He sought reinstatement, back pay, damages, attorneys' fees, and costs.

The jury awarded appellant $50,000. The district court granted appellees' motions for judgment notwithstanding the verdict on the grounds that (1) appellant failed to exhaust his administrative remedies and (2) there was no evidence that appellant was terminated for exercising his First Amendment rights or that appellees acted in bad faith. The district court also denied appellant's motion for equitable relief. This appeal followed.

Four issues are raised: (1) whether appellant's claim is barred because he failed to exhaust administrative remedies; (2) whether the jury's verdict lacked support in the evidence; (3) whether, if the judgment notwithstanding the verdict is reversed, appellees are entitled to a new trial; and (4) whether appellant was entitled to equitable relief.

1. *Exhaustion of Administrative Remedies*

Washington law provides that if the board of directors of a school district determines there is "probable cause" not to renew a teacher's contract for the next school term, the board shall notify the teacher by April 15, specifying the cause for nonrenewal.[2] Within ten days after receiving the notice of nonrenewal the teacher may request a hearing before the board,[3] or file an appeal to the state superior court.[4] If a hearing is held before the board, the board shall notify the teacher "of its final decision to renew or not renew" the employment contract within ten days after the hearing is concluded.[5] If the teacher does not request a

1. All of the individual defendants were sued in both their individual and official capacities.
2. Rev. Code Wash. § 28A.67.070.
3. *Id.*
4. Rev. Code Wash. § 28A.58.515.
5. Rev. Code Wash. § 28A.67.070.

hearing before the board (or file an appeal in the superior court) within the time allowed, the decision of the board not to renew becomes final and conclusive. *Robel v. Highline School District*, 65 Wn.2d 477, 485, 398 P.2d 1, 6 (1965); *State ex rel. Bohanon v. Wanamaker*, 47 Wn.2d 794, 803, 289 P.2d 697, 701-01 (1955).

On April 1, 1970, the school board sent appellant a "resolution of non-renewal," asserting "probable cause for non-renewal" on listed grounds. The notice did not inform appellant that he had ten days to request a hearing or file suit. Appellant testified that he knew of his statutory right to request a hearing, but thought he had 30 days within which to act.[6] He further testified that he learned of the deadline from another teacher on Friday, April 10, the ninth day of the statutory ten-day period. On the same day, appellant delivered a note to the school personnel officer reading, "The non-renewal of my contract was, as you know, illegal. There will accordingly be a legal challenge to the decision of the school board." On the following Monday, apparently two days after the ten-day period had run,[7] appellant contacted his attorney, and, on the attorney's advice, delivered another note to the school personnel officer, reading, "I have already indicated that there would be a challenge to my illegal dismissal. At what time would it be possible to obtain a hearing with the school board?"

The secretary of the board wrote to appellant in response

6. Appellant's confusion is understandable in view of Rev. Code Wash. § 28A.58.460 (former § 28.58.460), which provides:

> Any teacher . . . desiring to appeal from . . . [a] failure to renew that employee's contract for the next ensuing term, within thirty days after his or her receipt of such decision or order, may serve upon the chairman of the school board and file with the clerk of the superior court . . . a notice of appeal which shall set forth also in a clear and concise manner the errors complained of.

The parties apparently agree that this 30-day time limit applies to an appeal to the superior court from the final decision of the board, as distinguished from review of the board's initial determination of probable cause. The distinction would hardly be obvious to a layman, particularly in this case where the notice served upon appellant after reciting the finding of probable cause went on to state "that the contract of Lawrence S. Wagle shall not be renewed for the 1970-71 school year."

7. Saturdays and Sundays are apparently included in the statutory 10-day period. Rev. Code Wash. § 1.12.040.

to both letters. The secretary stated that appellant's first note was not a request for a hearing, that his second note was not timely under the statute, and that neither note was addressed to the "chairman or secretary" of the board as the statute required. The secretary's letter concluded, "[T]he Board of Education may not waive or alter statutory requirements. The Board therefore cannot grant you a hearing on the non-renewal of your contract."

The district court agreed with the school board that appellant's two notes did not satisfy the requirements of the Washington statute. For this reason, the court concluded that appellant had failed to exhaust his administrative remedy under the statute, and that this failure "was fatal to his action under § 1983."

It is a general rule that a litigant must exhaust available and adequate state administrative remedies before seeking relief in federal court.[8] Generally, suits under the Civil Rights Act are excepted from the rule because the remedy afforded by the Act "is supplementary to the state remedy." *Monroe v. Pape*, 365 U.S. 167, 183 (1961).[9] Appellees argue, however, that the present case is governed by decisions of this court which hold that in some circumstances the exhaustion rule does apply to actions under the Civil Rights Act. *See Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *Toney v. Reagan*, 467 F.2d 953 (9th Cir. 1972); *Bignall v. North Idaho College*, ... F.2d .... (9th Cir. 1976).[10]

8. *See, e.g., Eisen v. Eastman*, 421 F.2d 560, 567 & n.11 (2d Cir. 1969; Wright, Federal Courts § 49.

9. Other Supreme Court holdings that it is not necessary to exhaust state administrative remedies before filing a § 1982 action include: McNeese v. Board of Education, 373 U.S. 668, 672 (1963); Damico v. California, 389 U.S. 416, 416-17 (1967); King v. Smith, 392 U.S. 309, 312 n.4 (1968); Houghton v. Shafer, 392 U.S. 639, 640 (1968); Wilwording v. Swenson, 404 U.S. 249, 251 (1971); Steffel v. Thompson, 415 U.S. 452, 472-73 (1974); Ellis v. Dyson, 421 U.S. 426, 432-33 (1975).

10. The Supreme Court has neither approved nor disapproved this court's view. However, the Court has expressly reserved the question whether the non-exhaustion exception applies to a Civil Rights Act claim where "'a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding . . . .' Gibson v. Berryhill, 411 U.S. 564, 574-75 (1973).

The exhaustion rule is not to be "woodenly" applied. *Morgan v. LaVallee*, 526 F.2d 221, 223 (2d Cir. 1975) "Application of the rule is not jurisdictional, but calls for the sound exercise of judicial discretion." *Kale v. United States*, 489 F.2d 449, 454 (9th Cir. 1973).[11] Even in those areas of the law in which exhaustion of administrative remedies is generally required, judicial review will not be denied for failure to exhaust such remedies unless, on balance, the interests served by requiring exhaustion outweigh the injury the complainant would suffer if exhaustion were required. *McKart v. United States*, 395 U.S. 185, 197 (1969); *McGee v. United States*, 402 U.S. 479, 484 (1971); *United States v. Newman*, 478 F.2d 829, 831-32 (8th Cir. 1973).

The damage to appellant would be substantial if his remedy under the Civil Rights Act were withdrawn. The state has denied him any remedy, administrative or judicial. If his federal judicial remedy were also foreclosed, appellant would have no recourse for the termination of his employment and the substantial financial loss he has sustained (allegedly, and as found by the jury) because he exercised rights guaranteed to him by the First Amendment.

Whether the severe burden that would be imposed upon appellant by denying judicial review would be outweighed by the governmental interests at stake depends primarily upon the function served by the particular administrative process and the nature of appellant's default. *McGee v. United States, supra*, 402 U.S. at 484.

If the administrative process serves an important purpose in the scheme established by the state for the resolution of the kind of dispute involved, failure to exhaust the administrative process may seriously affect the interests of the state. If the state does not rely heavily upon the administrative process, bypassing that process will have less serious consequences. The present case falls in the second category. Under the Washington statutory scheme, appellant was not required to seek a hearing before the board

11. *See also* NLRB v. Industrial Union of Marine Workers, 391 U.S. 418, 426 n.8 (1968); Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976), *affirming* 391 F. Supp. at 1025 n.3.

before appealing to a state court. The Washington statute provides, "In lieu of requesting a hearing before the board of directors . . . an employee may elect to appeal the action of the board directly to the superior court of the county in which the school district is located. . . ." Rev. Code Wash. § 28A.58.515. A state statute also provides that if the employee elects to request a hearing before the board any appeal to the superior court after the board has acted "shall be heard de novo by the superior court." Rev. Code Wash. § 28A.58.480.

This statutory scheme negates the existence of any state interest in requiring exhaustion of the administrative remedy. An aggrieved employee is free to ignore the administrative process entirely.[12] If he elects to use the administrative process, the administrative decision has no significant effect upon subsequent judicial procedures.[13] Washington does not rely upon the administrative process either as a fact-finding mechanism or as a means for developing and applying special administrative expertise. It would be anomalous for the federal courts to attribute a value to the state administrative process the state itself does not.

The minimal state interest in requiring exhaustion is emphasized by the nature of appellant's default. Appellant did not interrupt an on-going administrative proceeding. Nor did appellant deliberately circumvent the administra-

12. *See* District of Columbia v. Brady, 288 F.2d 108, 110 (D.C. Cir. 1960) (in banc) (exhaustion is not required where the administrative remedy is an alternative remedy).

13. Rev. Code Wash. § 28A.58.480 states that any appeal from the administrative proceeding to the superior court "shall be heard de novo by the superior court." The state supreme court has held this provision to mean that "the trial court's determination must be made independent of any conclusion by the school board, and is to be based solely upon the evidence and testimony which the trial court receives." Hattrick v. North Kitsap School Dist., 81 Wash. 2d 668, 670-71, 504 P.2d 302, 303 (1972). "[T]he trial court's determination must be its own, unhampered by the findings and conclusions of the school board." *Id.* at 671, 504 P.2d at 303. *See* Goodman v. Bethel School Dist. No. 403, 84 Wash.2d 120, 128, 524 P.2d 918, 923 (1974).

The independent nature of superior court review is in no way undermined by the requirement in Rev. Code Wash. § 28A.58.470 that the school board must file the administrative transcript and exhibits with the superior court. *See* Francisco Board of Directors, 85 Wash.2d 575, 583-84 & n.1, 537 P.2d 789, 794 & n.1 (1975).

tive process and deny the board an opportunity to develop the facts and correct its own errors. On the contrary, appellant made every effort to obtain a board hearing. He was denied that opportunity because he addressed his request to the wrong official (though the proper official had actual notice and aswered his letter), and because he did not file his request within ten days (though he filed a letter protesting the illegality of the nonrenewal on the ninth day—a Friday—and a request for a hearing on the twelfth day—the following Monday—and though he filed late because of an understandable confusion as to the applicable time limits. *See* note 6). There is nothing in this case that will induce the frequest and deliberate flouting of the state administrative process. Moreover, the board did not suggest that appellant's default prejudiced the board in any way. The board denied appellant a hearing only because the board was advised that it was not permitted to "waive or alter statutory requirements."

The state may impose unyielding technical preconditions upon administrative review if it wishes. If the state chooses to take that course, however, it can hardly be said that the state has a compelling interest in seeing that the administrative process is actually used. *Cf. United States v. Newman, supra,* 478 F.2d at 831-32. In view of the harsh impact of the exhaustion doctrine when invoked to deny appellant any judicial review of his claim, "an insubstantial procedural default . . . should not shield an invalid order from judicial correction. . . ." *McGee v. United States, supra,* 402 U.S. at 484-85.

Although resort to the administrative remedy in the cases relied upon by appellees and in the present case might have forestalled the deprivation, the balance of interests was in other respects quite different. In *Toney v. Reagan, supra,* and *Bignall v. North Idaho College, supra,* the claimant was not denied a remedy. The administrative remedy remained open; the only burden imposed upon the claimant was that he exhaust it before obtaining judicial review. In these cases, as well as in *Whitner v. Davis, supra,* the administrative process performed a crucial fact-finding function; and in all three cases the claimant deliberately sought to avoid and frustrate the administrative process. Moreover,

in both *Whitner v. Davis* and *Bignall v. North Idaho College,* the gravamen of the Civil Rights Act complaint was that the administrative process was constitutionally inadequate. Since exhaustion is not required if the administrative remedy is inadequate, the decision of that question by the court resolved the merits of the claim. *Gibson v. Berryhill,* 411 U.S. 564, 574-75 (1973).[14]

The only interest that might be served by requiring the exhaustion of the state administrative remedy in a case such as this is the interest of the federal court in avoiding additional litigation—as the court would if the underlying dispute were resolved in the administrative process. This consideration is not alone enough to support an exhaustion requirement, as the many cases holding that state judicial remedies need not be exhausted before filing an action under the Civil Rights Act demonstrate.[15]

Balancing the relevant factors, we conclude that appellant is not barred by failure to exhaust administrative remedies.

2. *Sufficiency of the Evidence*

The issue submitted to the jury was whether appellees terminated appellant's employment as a teacher because they disapproved of communications and expressive activities protected by the First Amendment, or because he was an ineffective teacher.[16] There was evidence from which the jury could have inferred either motive. The motion for judgment notwithstanding the verdict was therefore improperly granted. *Cockrum v. Whitney,* 479 F.2d 84, 85 (9th Cir. 1973).

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14. This is also true of Beattie v. Roberts, 438 F.2d 747 (1st Cir. 1971). (In addition, insofar as it found a general or automatic requirement of administrative exhaustion, Beattie was overruled by Raper v. Lucey, 488 F.2d 748, 751 n.3 (1st Cir. 1973).)

15. *See* cases cited in footnote 9. *See* also Canton v. Spokane School Dist. # 81, 498 F.2d 840, 844 (9th Cir. 1974); Whitner v. Davis, 410 F.2d 24, 28 (9th Cir. 1969).

16. Appellees do not contend that appellant's expressive activities had a disruptive impact on the school. Rather, appellees argue that these activities did not influence the decision not to renew appellant's contract, except to the extent that they may have interfered with appellant's teach-

Appellant was employed by the R. A. Long High School in 1962. During the first five years of his service his competency as a teacher was not challenged seriously enough to inspire any suggestion of nonrenewal of his contract. In the fall of 1965 he was elected chairman of the local chapter of the American Civil Liberties Union. In the spring of 1966 he began to challenge long accepted practices at the high school as violative of the separation of church and state—including holding baccalaureate services at the school and offering prayers at the annual honor society banquet. In October 1967 appellant wrote a letter to the local newspaper expressing his views on the subject. A public controversy ensued which continued into the spring of 1968. Early in the same year, appellant wrote a letter to the local newspaper defending ACLU's position favoring legalization of marihuana. This letter, too, provoked intense public comment, largely critical of appellant. After a year of comparative quiet, it was brought to public attention that appellant had made available to his students a pamphlet titled, "The Student as Nigger," which, in unrestrained language, analogized the student-teacher relationship to a system of slavery.[17] There was evidence that criticism of appellant's effectiveness as a teacher began with the church-state controversy, intensified during the marihuana incident, diminished in the lull preceding the distribution of the pamphlet, recommenced following that distribution, and continued until appellant's termination. There is also evidence that in faculty meetings, exchanges between ap-

ing. The district court stated the issue for the jury as follows:

> Was the plaintiff non-renewed for probable cause because he had become an ineffective teacher, or was plaintiff non-renewed because of his exercise of his constitutionally protected rights of free speech and association?

Although appellant has not challenged the quoted instruction, to avoid possible misunderstanding we note that recent decisions of this court establish that a decision to terminate a teacher's employment is unlawful even if only partially in retaliation for the exercise of constitutional rights. Mabey v. Reagan, . . . F.2d . . ., slip op. at 11-12 (9th Cir. June 1, 1976); Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 806 (9th Cir. 1975).

17. Appellant testified that the pamphlet was authored by Prof. Jerry Farber, a teacher at California State College in Los Angeles, and appeared in an educational journal published in Toronto, Canada, from which the copies distributed by appellant were reproduced.

pellant and the school principal and superintendent, and meetings of the board, appellant's expression of controversial views was linked with his possible dismissal. Finally, there was evidence that appellees were aware of the problem of sustaining a dismissal based upon appellant's communications, and deliberately undertook to "build a record" to support dismissal on other grounds.

From this circumstantial evidence the jury could reasonably infer that appellant's termination was motivated by the public expression of his controversial views.

Since there is a reasonable basis for the jury's verdict it could not be set aside even if on the whole record we thought it more likely that appellees discharged appellant because he was an ineffective teacher, as they testified. "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & P. V. Ry.*, 321 U.S. 29, 35 (1944). Nor is the verdict flawed because it rests, as the trial court put it, "upon guess, speculation, or conjecture." As the Supreme Court said in *Lavender v. Kurn*, 327 U.S. 645, 653 (1946): "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." This is particularly true when the issue is motive, as in this case.[18]

18. Appellees argue that the district court should have granted appellees' conditional motion for new trial (*see Fed. R. Civ. P. 50(c)*), because the form of verdict submitted to and completed by the jury did not disclose whether appellees acted in bad faith or whether they were found liable in their individual or official capacities.

We reject the argument for three reasons. First, appellees did not object to the form of verdict although appellees' counsel indicated in colloquy with the trial court at a post-trial hearing that he had seen the form of verdict before the case was submitted to the jury. Second, we agree with appellant that under the instructions as given, the jury could have found appellees liable only if the jury found appellees had acted in bad faith as defined in the instructions; and appellees did not object to the definition of bad faith on any ground relevant here. Finally, bad faith was established as a matter of law since the jury found that appel-

3. *Remedy*

After the verdict had been received, appellant moved for an order requiring reinstatement and an award of back pay. Obviously, equitable relief was barred by the court's determination that the evidence was insufficient to show that appellant had been terminated in violation of his First Amendment rights. The trial judge added, however, "[e]ven if my conclusions were other than those stated here today, in the exercise of discretion, I would deny the request."

We recently sustained denial of reinstatement of a teacher discharged under an unconstitutionally vague statute. *Burton v. Cascade School District Union High School No. 5*, 512 F.2d 850 (9th Cir. 1975). The circumstances of that case were unusual. Our opinion in that case strongly suggests that the result was influenced by the fact that the teacher's assignment included supervision of sports activities for girls, and her dismissal was based upon her admission that she was a "practicing homosexual." We recognized that reinstatement is usually granted in cases involving discharge "aimed at punishing the exercise of free speech." *Id.* at 853 & n. 3.[19] The record in this case reflects no special circumstances that would justify denying the usual relief. Accordingly, appellant should be reinstated to his position.

Ordinarily, an award of back pay, diminished by any interim earnings, is an integral part of the remedy of rein-

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lees failed to renew appellant not "because he had become an ineffective teacher" but "because of his exercise of constitutionally protected rights of free speech and association," (*see* note 16), and the rights violated were "clearly established constitutional rights." Wood v. Strickland, 420 U.S. 308, 322 (1975). The verdict negated the possibility that appellant was not renewed because the manner in which he exercised his First Amendment rights interfered with the effective performance of his duties as a teacher, and as noted earlier (note 16) appellees have not contended that appellant's communicative activities disrupted the school. *See* Pickering v. Board of Education, 391 U.S. 563, 572-73 (1968). On such a record it is appropriate to sustain the award of damages as to appellees in their individual capacity without remanding for determination of the good faith issue. *Cf.* Slate v. McFetridge, 484 F.2d 1169 (7th Cir. 1973).

19. *See, e.g.*, Gieringer v. Center School Dist. No. 58, 477 F.2d 1164, 1167 (8th Cir. 1973); Johnson v. Branch, 364 F.2d 177, 182 (4th Cir. 1966); *cf.* Keefe v. Geanakos, 418 F.2d 359, 363 (1st Cir. 1969).

statement.[20] There is some doubt, however, whether the jury may have included back pay in calculating damages. It will be open to the trial court on remand to resolve this issue, and, if it appears that double recovery would otherwise result, to reduce either the award of damages or of back pay.

The denial of attorneys' fees is affirmed. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

Affirmed in part, reversed in part, and remanded for proceeding consistent with this opinion.

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20. Thomas v. Ward, 529 F.2d 916, 920 (4th Cir. 1975); Harkless v. Sweeny Independent School Dist., 427 F.2d 319, 324 (5th Cir. 1970).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE S. WAGLE,
Plaintiff-Appellant,

v.

H. MAX MURRAY, as Principal of the R. A. Long High School, and H. MAX MURRAY & JANE DOE MURRAY, husband and wife, individually, et al.,
Defendants-Appellees.

FILED
Jan. 19, 1977

Emil E. Melfi, Jr.
Clerk,
U.S. Court
of Appeals

No. 75-2066

ORDER

Before: BROWNING and CHOY, Circuit Judges, and *WEIGEL, District Judge

The opinion filed November 10, 1976, is modified as follows:

Delete the concluding paragraph, beginning "The denial of attorneys' fees . . ." and substitute:

> The district court on remand will also reconsider the denial of attorneys' fees in light of the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641 (October 19,1976).

The petitions for rehearing are denied.

*Honorable Stanley A. Weigel, United States District Judge, Northern District of California, sitting by designation.

APPENDIX G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 31, 1977

Harry R. Calbom, Jr., Esq.
Calbom, Cox, Andrews, Hamm & Pond
P.O. Box 1173
Longview, Washington 98632

RE: H. Max Murray, etc., et al. v.
Lawrence S. Wagle, 76-1447

Dear Sir:

The Court today entered the following order in the above-entitled case:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Mr. Justice Marshall and Mr. Justice Stevens would deny certiorari.

Encl. = cc opin. in
75-1278

Very truly yours,

Michael Rodak, Jr., Clerk
By
Helen Taylor (Mrs.)
Assistant Clerk

Jerry D. Anker, Esq.
Wald, Harkrader & Ross
1320-19th St., N.W.
Washington, D.C. 20036

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE S. WAGLE,
Plaintiff-Appellant,

v.

H. MAX MURRAY, as Principal of the R. A. Long High School, and H. MAX MURRAY & JANE DOE MURRAY, husband and wife, individually; RUSSELL ESVELT & JANE DOE ESVELT, husband and wife; MILTON H. SMITH, as Superintendent of Longview School District No. 122; BETTY BUCK, HAROLD FREIBERG, DAVID HALLIN, RAYMOND MCDERMOTT and EUNICE VAN SICKLE, as members of the Board of Directors of Longview School District No. 122; BETTY BUCK and CHARLES E. BUCK, husband and wife; RAYMOND MCDERMOTT and JANE DOE MCDERMOTT, husband and wife; EUNICE VAN SICKLE and R. V. VAN SICKLE, wife and husband; LONGVIEW SCHOOL DISTRICT N. 122, a Washington municipal corporation,
Defendants-Appellees.

FILED
Sept. 2, 1977

Emil E. Melfi, Jr.
Clerk,
U.S. Court
of Appeals

No. 73-2066

OPINION

Appeal from the United States District Court
for the Western District of Washington

Before: BROWNING and CHOY, Circuit Judges,
and *WEIGEL, District Judge

PER CURIAM:

*Honorable Stanley A. Weigel, United States District Judge, Northern District of California, sitting by designation.

The jury returned a verdict of $50,000 for appellant in his action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, against school officials and a school district, alleging termination of appellant's employment as a high school teacher for exercising rights under the First Amendment. The trial judge granted appellees' motion for judgment notwithstanding the verdict. On appeal we reversed. On petition for certiorari the Supreme Court vacated our judgment and remanded for further consideration in light of *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). *Murray v. Wagle*, ... U.S. ...., 97 S. Ct. 2645 (1977).

Mt. Healthy held that a teacher allegedly fired for exercising First Amendment rights has the burden of proving his conduct was constitutionally protected and was a "motivating factor" in the decision not to rehire him. The burden then shifts to the school district and officials to show by a preponderance of the evidence that the teacher would have been fired even in the absence of the protected conduct. *Mt. Healthy City School District v. Doyle, supra*, 429 U.S. at 287.

In the present case the jury was instructed that appellant contended his contract would have been renewed "but for" his exercise of constitutionally protected rights and had the burden of showing that his contract was not renewed "because of" his exercise of those rights. The jury was further instructed that in order to find against the school officials, as it did, it must find they did not renew appellant's contract "without having probable cause to believe that plaintiff was ineffective as a teacher."

These instructions considered as a whole required appellant to show by a preponderance of the evidence that his contract would have been renewed except for his exercise of constitutionally protected rights. This is a greater burden of proof than that imposed upon the teacher in *Mt. Healthy*.

Appellees argue that the comments of the district judge when he granted judgment n.o.v. established that the judge applied the *Mt. Healthy* standard, and that the court's judgment should therefore be affirmed. *Mt. Healthy* indicates the "trier-of-fact" should determine whether the firing would have occurred without the protected conduct.

Mt. Healthy City School District v. Doyle, supra, 429 U.S. at 286. In *Mt. Healthy,* the case was tried to the judge. *See id.* at 287. In the present case, however, trial was to a jury. It was for the jury, not the judge, to determine whether appellant would have been fired in any event. The judgment n.o.v. can stand only if the evidence was insufficient for the jury to arrive at its verdict. *Cockrum v. Whitney,* 479 F.2d 84, 85 (9th Cir. 1973). As indicated in our original opinion, the evidence was sufficient. *See Wagle v. Murray,* 546 F.2d 1329, 1334-35 (9th Cir.), *vacated and remanded on other grounds,* .... U.S. ...., 97 S. Ct. 2645 (1977).

Upon reconsideration, therefore, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion and the opinion at 546, F.2d 1329.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE S. WAGLE,
Plaintiff-Appellant,

v.

H. MAX MURRAY, as Principal of the R. A. Long High School, et al.,
Defendants-Appellees.

FILED

Sept. 29, 1977

Emil E. Melfi, Jr.
Clerk,
U.S. Court
of Appeals

No. 73-2066

ORDER

Before: BROWNING and CHOY, Circuit Judges, and
*WEIGEL, District Judge

The petition for rehearing is denied.

Supreme Court, U. S.
FILED
NOV 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-632

H. MAX MURRAY, et al.,
Petitioners,

v.

LAWRENCE S. WAGLE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-632

H. MAX MURRAY, et al.,
Petitioners,

v.

LAWRENCE S. WAGLE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

After eight years of employment as a teacher in a public high school, respondent's contract was not renewed. He brought suit in a United States District Court claiming that his employment was terminated because of his publicly-expressed views on certain controversial issues, in violation of his right of free speech under the First and Fourteenth Amendments. After a nine-day trial, at which some thirty witnesses testified, a jury returned a verdict for respondent. The District Judge

set the verdict aside and entered judgment N.O.V. for petitioners, but the Court of Appeals reversed, finding that there was ample evidence from which "the jury could reasonably infer that appellant's termination was motivated by the public expression of his controversial views." (Pet. A-25.) The court summarized the evidence as follows:

> "Appellant was employed by the R. A. Long High School in 1962. During the first five years of his service his competency as a teacher was not challenged seriously enough to inspire any suggestion of nonrenewal of his contract. In the fall of 1965 he was elected chairman of the local chapter of the American Civil Liberties Union. In the spring of 1966 he began to challenge long accepted practices at the high school as violative of the separation of church and state—including holding baccalaureate services at the school and offering prayers at the annual honor society banquet. In October 1967 appellant wrote a letter to the local newspaper expressing his views on the subject. A public controversy ensued which continued into the spring of 1968. Early in the same year, appellant wrote a letter to the local newspaper defending ACLU's position favoring legalization of marihuana. This letter, too, provoked intense public comment, largely critical of appellant. After a year of comparative quiet, it was brought to public attention that appellant had made available to his students a pamphlet titled, 'The Student as Nigger,' which, in unrestrained language, analogized the student-teacher relationship to a system of slavery. There was evidence that criticism of appellant's effectiveness as a teacher began with the church-state controversy, intensified during the marihuana incident, diminished in the lull preceding the distribution of the pamphlet, recommenced following that distribution, and continued until appellant's termination. There is also evidence that in faculty meetings, exchanges between appellant and the school principal and superintendent, and meetings of the board, appellant's expression of controversial views was linked with his possible dismissal. Finally, there was evidence that appellees were aware of the problem of sustaining a dismissal based upon appellant's communications and deliberately undertook to 'build a record' to support dismissal on other grounds." (Pet. A-24-25; footnote omitted).

Subsequent to the original decision of the Court of Appeals, this Court issued its decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). Petitioners then filed a petition for certiorari (No. 76-1447), contending in substance that the decision in this case was inconsistent with *Mt. Healthy*. This Court granted the writ and summarily remanded the case to enable the Court of Appeals to reexamine its decision in light of *Mt. Healthy*. (Pet. A-29.)

On remand, the Court of Appeals reaffirmed its original decision, holding that the District Judge's instructions to the jury were not only consistent with *Mt. Healthy*, *supra*, but in fact required plaintiff to meet an even more stringent burden of proof:

> "*Mt. Healthy* held that a teacher allegedly fired for exercising First Amendment rights has the burden of proving his conduct was constitutionally protected and was a "motivating factor" in the decision not to rehire him. The burden then shifts to the school district and officials to show by a preponderance of the evidence that the teacher would have been fired even in the absence of the protected conduct. *Mt. Healthy City School District* v. *Doyle*, *supra*, 429 U.S. at 287.
>
> "In the present case the jury was instructed that appellant contended his contract would have been renewed 'but for' his exercise of constitutionally pro-

tected rights and had the burden of showing that his contract was not renewed 'because of' his exercise of those rights. The jury was further instructed that in order to find against the school officials, as it did, it must find they did not renew appellant's contract 'without having probable cause to believe that plaintiff was ineffective as a teacher.'

"These instructions considered as a whole required appellant to show by a preponderance of the evidence that his contract would have been renewed except for his exercise of constitutionally protected rights. This is a greater burden of proof than that imposed upon the teacher in *Mt. Healthy*." (Pet. A.-31).

Petitioners then filed a second petition for certiorari.

ARGUMENT

Petitioners have contended throughout this case that respondent was terminated, not because of his free speech activities, but because he was an inadequate or ineffective teacher. They repeat this contention in their petition for certiorari. But the jury found that respondent was terminated because of his speech, and the Court of Appeals, after reviewing the record, determined that there was abundant evidence to support that finding. We believe the Court of Appeals was correct, but in any event, this Court does "not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Petitioners argue that the decision below is somehow inconsistent with *Mt. Healthy*. But as the Court of Appeals pointed out, the issue to be decided under *Mt. Healthy* is a factual, not a legal, one. *Mt. Healthy* held that a public employee allegedly discharged for exercising First Amendment rights has the burden of proving that his protected conduct was a "substantial" or "motivating factor" in the decision to discharge. The em-

ployer then has the burden to show that the employee would have been discharged "even in the absence of the protected conduct." 429 U.S. at 287. Since the present case was tried to a jury, the issue here is whether the instructions to the jury were consistent with *Mt. Healthy*. The Court of Appeals, after reviewing the jury instructions, concluded that they placed an even greater burden on respondent than *Mt. Healthy* required, since they placed on *him* the burden of proving "that his contract would have been renewed except for his exercise of constitutionally protected rights." (Pet. A-31.)

Petitioners disagree with the Court of Appeals' interpretation of the jury instructions. They contend that the instructions permitted the jury to return a verdict for respondent if "it found that the school disapproved of the protected activity, whether or not he was *also* an ineffective teacher, and regardless of independent grounds for non-renewal." (Pet. 8.) In support of this contention, they cite only a small portion of the instruction, taken out of context.[1] The Court of Appeals, after re-

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[1] At pp. 7-8 of the petition, petitioners quote a portion of the jury instructions as follows:

"In order to prove his claim, the burden is upon the plaintiff to establish, by a preponderance of the evidence, the facts that: First: That the non-renewal of plaintiff's teaching contract was because of his exercise of his constitutional rights.

* * * *

"An injury or damage is proximately caused by an act, or failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonable probable consequence of the act or omission." (Petitioners' emphasis.)

Omitted from this excerpt, as indicated by petitioners' asterisks, was the following crucial language:

[continued]

viewing the *entire* instruction, unanimously rejected petitioners' contention. Again, we believe the court was correct, but in any event, this is not the kind of issue which merits the attention of this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

"Second: That the non-renewal of plaintiff's teaching contract was the proximate cause of the injury and consequent damage to plaintiff."

When these words are reinserted where they belong, it becomes clear that the language which petitioners have italicized referred not to the causal relationship between respondent's free speech and the nonrenewal of his contract, but rather to the causal relationship between such nonrenewal and his monetary injury or damage.

The fragment of the instruction quoted by petitioner is only a small part of the portion which bears on the *Mt. Healthy* issue. If the Court desires to read the entire portion which is relevant, it can be found in our brief in opposition to the earlier petition for certiorari, No. 76-1447, at pp. 4-5.